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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MERLE LADNER ADAMS et al., Plaintiffs and Appellants, v. I. DAVID SMALL, Defendant and Respondent.	D054402 (Super. Ct. No. GIC837421)

APPEAL from a judgment of the Superior Court of San Diego County, Richard E.L. Strauss, Judge. Affirmed in part; reversed in part.

Merle Ladner Adams and 31 other individuals who invested in a ponzi scheme (hereafter sometimes Investors) brought this action against I. David Small, an attorney who represented the perpetrators of the ponzi scheme, for (1) fraud and deceit by active concealment; (2) aiding and abetting fraud and deceit; (3) violating state securities laws; (4) violating the state unfair business practices statute; and (5) common law conspiracy. The lawsuit also contained a cause of action for legal malpractice brought on behalf of

five Investors (collectively Estate Investors), who hired Small for estate planning purposes.[1] Estate Investors claimed Small breached (1) his duty to inform his clients of negative information about their investments and (2) his duty to disclose the conflict of interest between his representation of the perpetrators of the ponzi scheme and his representation of them.

Investors appeal the judgment entered against them after the trial court granted three summary adjudication motions that disposed of all the causes of action against Small. Estate Investors also contend the trial court erred by finding as a matter of law that Small did not have a duty to disclose information about their investments and that there was no conflict of interest. With respect to all but one of the other causes of action against Small,[2] Investors contend the trial court erred in granting Small's other two motions for summary adjudication. Investors also claim the trial court made various evidentiary errors, including rejection of their expert evidence on Small's duty to Estate Investors and evidence from other criminal and civil proceedings.

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1 Estate Investors are Iona Cridland, Kenneth Patterson, Patricia Patterson, Robert Dolfi and Helen Gleason.

2 Investors have not assigned error to the trial court's ruling on the cause of action alleging violations of state securities laws, specifically Corporations Code sections 25504.1 and 25504.

FACTS[3]

Small, who was primarily an estate planning attorney, met Daniel Heath in 1988. In the early 1990's, Small began appearing at financial planning seminars arranged by Heath, who solicited members of the audience to invest in his financial products. Small spoke solely about estate planning; he did not discuss Heath's investments or securities at the seminars. Small continued to attend the seminars until 2003, and, at least during one two-year period, did so as often as every other Thursday. Heath referred some of his investors to Small for estate planning work.

Through Heath, Small met Larre Schlarmann, a real estate developer who sometimes did business with Heath. Small represented Heath and Schlarmann in some of their business affairs. In the early 1990's, Small prepared articles of incorporation,

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3 We recite the facts based on the evidence properly admitted before the trial court. "We review the trial court's decision de novo, considering 'all of the evidence set forth in the [supporting and opposition] papers, except that to which objections have been made and sustained by the court. . . .'" (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612, quoting Code Civ. Proc., § 437c, subd. (c).) The statement of facts in Investors' opening brief improperly recited facts based on evidence that was ruled inadmissible by the trial court. To make matters worse, Investors' counsel, in setting forth the evidence, did not indicate whether it had been admitted or excluded. Such briefing makes it difficult for an appellate court to ascertain what evidence was properly before the trial court. It should not be necessary for an appellate court to cull through a lengthy record — in this case a joint appendix of nearly 3,000 pages — to figure out what took place below.

We observe the trial court criticized the briefing below by counsel for Investors: "[T]he evidence cited in order to controvert the facts set forth in Small's separate statement either failed to state what plaintiffs represented the evidence would state, or failed to create a dispute as to the *particular fact at issue.* In such instances, the [c]ourt treated such facts as undisputed. Additionally, the [c]ourt found many occasions where plaintiffs' characterization of the evidence was inaccurate or incorrect." We find this criticism also aptly describes the briefing by Investors' counsel on appeal.

articles of organization for limited liability companies and other documents for various business entities being set up by Heath, as well as by Schlarmann, and filed them with the California Secretary of State. Small also represented Heath and Schlarmann when they were sued. Small generally advised them to resolve and settle claims to avoid costly litigation.

At the end of 1992, the California Department of Real Estate started investigating Schlarmann for selling fractionalized trust deeds. The investigation ended in 1993 after Schlarmann — at the Department's suggestion — let his real estate broker's license expire.

By 1993, Schlarmann and Heath had switched from selling fractionalized trust deeds to limited partnerships. In December 1993, Small filed incorporation papers on behalf of Hotel Management, Inc. At the same time, Small filed a certificate of limited partnership for Northwoods Resort Holdings, with Hotel Management as the general partner. Schlarmann and Heath used this limited partnership, as well as several other vehicles, to raise money for the development of a resort hotel at Big Bear Lake. Small filed certificates of limited partnership for other Heath and Schlarmann entities, some connected with the resort hotel and others for different projects. Investors Preferred Income Fund was Heath and Schlarmann's first public offering; Small wrote part of the public placement memorandum for the fund. Schlarmann used portions of this public placement memorandum, as well as three other public placement memoranda supplied by Heath, as a template for his succeeding numerous public offerings with Heath, but did not inform Small. As the various projects began to lose money, Heath and Schlarmann

solicited more investors to invest in the new offerings.[4] Heath and Schlarmann commingled the money they raised and used it to pay earlier investors the high rates of return that had been promised them.[5]

On December 16, 1997, Iona Cridland met with Small, who had been referred to her by Heath, to write her will. Earlier, Cridland had attended an investment seminar sponsored by Heath, and, on December 2, had invested more than $50,000 with Heath & Associates for a five-year secured corporate note. Cridland could not recall whether Small was at the investment seminar that she attended. Cridland did not rely on any statements made by Small when investing with Heath & Associates; she relied on Heath's representations. At the time of her initial investment, Cridland had not met Small. Small charged Cridland $700 for his legal services. Small did not inform Cridland that he represented Heath, Schlarmann and their financial entities.

On March 16, 1998, Patricia and Kenneth Patterson met with Small at Heath's office in Hemet and hired him to perform estate planning services. Patricia Patterson,

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4 Schlarmann testified in deposition that the hotel project was "hemorrhaging" money and could not sustain itself. Schlarmann assumed Small knew the hotel project was over budget by "millions of dollars" because "everybody associated with that project knew."

5 "A 'Ponzi scheme' is a fraudulent arrangement in which an entity makes payments to investors from moneys obtained from later investors rather than from any 'profits' of the underlying business venture. The fraud consists of funneling proceeds received from new investors to previous investors in the guise of profits from the alleged business venture, thereby cultivating an illusion a legitimate profitmaking business opportunity exists and inducing further investment." (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 906.)

who previously attended two seminars put on by Heath, already had invested in Heath & Associates; her husband, who attended one of the seminars with his wife, had not yet done so. Patricia Patterson could not recall whether Small was the attorney who spoke about estate planning at the seminars. Kenneth Patterson asked Small to explain how Heath's investments worked when there was a large pool of investors and who would be listed as the lienholder on the first trust deed. Small answered that he did not know exactly what Heath was doing with the investments, but explained that a group of investors could pool their money, and the group, as an entity, would be the lienholder. Kenneth Patterson did not ask Small for financial advice, but Small volunteered that his clients who had invested with Heath were happy and he had not heard of any complaints with Heath. Small also said that Heath would "take care" of the Pattersons. The Pattersons paid Small $1,553 for his estate planning services. Small did not inform the Pattersons that he represented Heath, Schlarmann and their financial entities.[6]

On March 30, 1998, the California Department of Corporations (DOC) issued a desist and refrain order against Heath and his business entities for engaging in the unregistered sale of securities.[7] Additionally, the DOC issued a desist and refrain order against Heath and his entities for acting as unregistered broker-dealers. Heath hired an

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6 While working on the Pattersons' estate plan or shortly thereafter, Small learned that Heath's business entities were subject to regulatory orders for violating state securities laws. Small did not inform the Pattersons of this development, which is discussed below.

7 The DOC also issued a desist and refrain order against Schlarmann and his entities for engaging in the sale of unregistered securities.

administrative law attorney, Mark McDonald, to represent him with respect to the DOC orders. On May 11, 1998, Heath & Associates and the DOC entered into a stipulated settlement. The stipulated settlement read, in part, that Heath & Associates "admit[ed] no violation, liability, fault or breach of any statute, regulation or order." The stipulated settlement also read that "nothing in the two Desist and Refrain Orders is intended to prevent [Heath & Associates] from offering and selling any security pursuant to a qualification or to any exemption from the qualification requirement under the Corporations Code," and "nothing in the two Desist and Refrain Orders is intended to be a statement as to the integrity of [Heath & Associates], their officers or agents, or of the investment potential of any security that [Heath & Associates] might offer now or in the future, including the investments subject to these Desist and Refrain Orders."

After a conversation with McDonald and a review of the stipulated settlement, Small understood that Heath and his entities could remain in business and that the settlement did not impugn their integrity.

On April 29, 1999, Robert Dolfi met with Small at Heath's office in Brea and hired him to create a family trust. Earlier that year, Dolfi attended a Heath investment seminar at which Small had discussed estate planning. Dolfi was not seeking financial investment advice from Small. Dolfi paid $1,295 for Small's legal services. In May 1999, Dolfi invested more than $70,000 with Heath & Associates. Small did not inform Dolfi that he represented Heath, Schlarmann and their financial entities. Additionally, Small did not inform Dolfi about the desist and refrain orders issued by the DOC.

In late 1999, Dolfi became concerned because he did not have the addresses of three of the limited liability companies in which he had invested approximately $390,000 and began to question whether these entities existed. By November, Dolfi believed Heath had misled him and that one of the limited liability companies — Antelope Road Mortgage Fund — was in financial distress.

In September 2002, Dolfi signed a release for all claims against Heath and Schlarmann with respect to the Antelope Road Mortgage Fund for $70,000 of the $100,000 he had invested in that fund.

By July 2002, Cridland was aware that her investment with the Menifee golf project was having financial difficulties.

On November 5, 2002, Helen Gleason met with Small and retained him to plan her estate. A year earlier, Gleason had invested more than $1 million with Heath. Heath referred Gleason to Small for estate planning. Gleason did not ask Small for legal advice concerning her investments. Among other things, Small set up a life insurance trust for Gleason and named himself as trustee. Small was trustee of Gleason's life insurance trust until July 15, 2004, when he resigned. Gleason paid Small $1,195 for his estate planning work. Small did not inform her that he represented Heath, Schlarmann and their financial entities or that they had been the subject of desist and refrain orders issued by the DOC.

In February 2003, First Trust Corporation (First Trust),[8] the IRA custodian for Heath's business entities, wrote Small a letter stating that it was not going to open new accounts for any entity associated with Heath or accept additional purchases by existing account holders. The basis for the suspension was First Trust's conclusion that Heath's business entities were not in compliance with the DOC's desist and refrain orders of 1998 and the stipulated settlement of those orders. Small's efforts to convince First Trust that Heath's business entities were in compliance with the DOC stipulated settlement were unsuccessful.

In July 2003, Small signed an opinion letter on behalf of a Heath business entity which was seeking a construction loan, stating, in part: "nothing has come to our attention which would lead us to conclude that [the entity] has not complied with all applicable provisions of California law requiring . . . registration and/or qualification." The letter also stated the opinions expressed were being "furnished solely for [the] benefit [of the construction lender] in connection with the subject transaction, and may not be relied upon for any other purpose or furnished to, used, circulated, quoted or referred to by any other person, without prior written consent." Accompanying the letter were false financial statements; however, Small did not prepare these financial statements.

In late April 2004, the Securities and Exchange Committee filed a complaint against Heath, among others, for violating federal securities laws; the action shut down

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8 Subsequently, First Trust changed its name to Fiserv ISS, which also was sued by Investors. We shall refer to Fiserv ISS as First Trust in this opinion.

the Heath & Associates entities. Subsequently, the District Attorney of Riverside County charged Heath and Schlarmann with more than 200 criminal violations of California securities laws, as well as several counts of elder theft and grand theft. In a plea bargain, Schlarmann pleaded guilty to 10 counts. In a jury trial, Heath was convicted of all but one count.

On October 20, 2004, Investors filed a complaint against Heath and Schlarmann and "Doe defendants 1 through 100." The original complaint included causes of action for violating state securities laws, fraud and deceit by active concealment, fraud and deceit based upon omissions and misrepresentations of material facts, negligent misrepresentation, breach of fiduciary duty, aiding and abetting fraud and deceit, violating the California Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) and conspiracy. The original complaint did not include a cause of action for legal malpractice. The original complaint stated "Doe defendants 26 through 50" included attorneys "who aided and abetted and assisted in the perpetration of the deceitful, fraudulent investment scheme." Small was not served with the original complaint.

On July 5, 2005, Investors identified Small as Doe defendant 26. On July 8, 2005, Estate Investors amended their complaint by adding a cause of action for legal malpractice against Small.

DISCUSSION

I

Challenged Evidentiary Rulings[9]

Investors contend the trial court erred in sustaining Small's evidentiary objections to (1) their expert's declaration, (2) a telephone conversation that was recorded without consent, (3) testimony from Heath's criminal trial and (4) the deposition testimony of Attorney McDonald in a different action.

We review the trial court's evidentiary rulings made on a summary judgment or summary adjudication motion for abuse of discretion. (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169.) To obtain reversal of a judgment based on the erroneous exclusion of evidence, the party must demonstrate a more favorable result probably would have ensued had the evidence been admitted. (See, e.g., *Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1223.)

A. *Exclusion of Expert's Declaration*

Investors presented the declaration of Attorney Judith Copeland, a California State Bar certified specialist in probate, estate planning and trust law, who opined that Small had the duty to advise and counsel his clients and to inform them of any material facts known to him that would or could affect their estate and assets. Copeland also opined that various acts and omissions by Small breached the prevailing standard of care and

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9 Investors have forfeited any assignment of error as to evidentiary rulings not challenged on appeal. (*Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1182, fn. 5.)

skill in California for probate, estate planning and trust attorneys. Small did not challenge Copeland's expertise, but objected to portions of Copeland's declaration on two grounds: (1) they lacked foundation and were speculative about Small's state of mind; and (2) they constituted impermissible expert evidence.

Small is correct that portions of Copeland's declaration relied on unsupported assumptions as well as evidence that was excluded by the trial court. For example, Copeland referred to lawsuits against Heath and Schlarmann that had been excluded as evidence. "The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. . . . Where an expert bases his conclusion upon assumptions which are not supported by the record, . . . or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value." (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135, citations omitted.) "[A]n expert's opinion based on assumptions of fact without evidentiary support . . . or on speculative or conjectural factors . . . has no evidentiary value . . . and may be excluded from evidence." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117, citations omitted.)

We also find the trial court correctly excluded those portions of the Copeland declaration in which Copeland offered opinions on the duty Small owed to Estate Investors. The existence of a duty is a legal question for the court. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477.) Because the question of duty is a legal question, an expert may not opine on whether a duty exists. (*Asplund v. Selected Investments in Financial Equities, Inc.* (2000) 86 Cal.App.4th 26, 50.)

However, expert testimony is admissible to establish the applicable standard of care in malpractice cases. (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001 [standard of care in malpractice cases "'"is a matter peculiarly within the knowledge of experts"'"; *Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 156.) Where the standard of care in a malpractice suit is not a matter of common knowledge, expert testimony is conclusive as to the proof of the prevailing standard of skill and learning in the locality and of the propriety of particular conduct by the practitioner in particular instances. (*Lysick*, at p. 156.) In fact, expert testimony is commonly used to establish the meaning and purpose of the Rules of Professional Conduct and how the rules may, or may not, apply to the facts of the case. (See Vapnek et al., Cal. Practice Guide: Prof. Responsibility (The Rutter Group 2008) ¶ 6:300, p. 6-60.4.)

In several paragraphs of her declaration, Copeland offered an opinion that Small breached the standard of care of a competent estate planning and trust lawyer. For example, in paragraph 7 of her declaration, Copeland stated:

> "I am of the opinion that Small fell below the standard of care in failing to disclose that on or about March 20, 1998, while Small was performing estate plan services for Ken and Patricia Patterson and prior to providing estate planning services for Robert Dolfi and Helen Gleason, Small learned that the California Department of Corporations had issued three cease and desist orders against Heath, Schlarmann, and various of their entities in which Plaintiffs were investing."

Small objected to this testimony, and Copeland's other proffered standard of care testimony, on the grounds it was impermissible expert opinion and lacked foundation. To the extent the trial court sustained the objections solely on the basis that it was impermissible expert opinion, the court erred. Copeland's proffered testimony on the

standard of care found in paragraphs 4 (lines 17-20), 7 and 11, is the proper subject of expert testimony and is sufficiently supported by competent evidence.[10] As we discuss in part II, *post*, Estate Investors sufficiently demonstrated that a more favorable result probably would have ensued had Copeland's standard of care opinion evidence been admitted. Accordingly, we reverse the trial court's evidentiary ruling as to paragraphs 4 (lines 17-20), 7 and 11 of the Copeland declaration, but otherwise find no error.

B. *Exclusion of Recorded Telephone Conversation*

Investors' exhibit 302 was a compact disc of a 75-minute telephone conversation in 2003 between representatives of First Trust, the custodian of IRA accounts in Heath's business entities, Heath and Small. Investors claim that throughout the recorded conversation, Small vigorously defended the legality of Heath's business entities. Small was unaware of, and did not consent to, the conversation being recorded. Small objected to admission of the compact disc on the basis of Penal Code section 632, prohibiting recording of telephone conversations without the consent of all parties to the conversation. The statute further provides that no evidence obtained as a result of such recording is admissible in *any* judicial proceeding except for criminal prosecutions of the statute. (Pen. Code, § 632, subd. (d).) The trial court sustained Small's objection.

On appeal, Investors claim that the objection should have been overruled because the compact disc would have impeached Small, who first denied the telephone

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10 Estate Investors may use paragraphs 4 (lines 17-20), 7 and 11 of Copeland's declaration in further proceedings to the extent otherwise allowed by law.

conversation took place and then said he recalled a only brief call he received from a First Trust official during his daughter's soccer game. Investors rely on *People v. Crow* (1994) 28 Cal.App.4th 440, which held evidence of recordings in violation of Penal Code section 632 "can be used to impeach inconsistent testimony by those seeking to exclude the evidence." (*Crow*, at p. 452.) We are somewhat skeptical of this proposition in light of the Legislature's clear language in Penal Code section 632, subdivision (d) precluding use of telephone conversations recorded without consent of the participants "in *any* judicial, administrative, legislative, or other proceeding." (Pen. Code, § 632, subd. (d), italics added.) Moreover, we note the sole authority cited in *Crow* was *Frio v. Superior Court* (1988) 203 Cal.App.3d 1480, in which the holding was much narrower. In *Frio*, the Court of Appeal ruled a telephone conversation recorded without consent could be used to impeach a specific, separate portion of the recorded conversation to refresh the witness's recollection. (*Id*. at p. 1497.)[11]

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11 Moreover, Investors' counsel have failed to direct us to the portions of the record that show Small denying the conversation took place and his later recall of a very abbreviated conversation with a First Trust official. Any reference to a matter in the record must be supported to the volume and page of the record where it appears. (Cal. Rules of Court, rule 8.204(a)(1)(C).) To the extent, briefs contain references to facts that are unsupported by appropriate citations to the record, we can ignore them. (See *Colt v. Freedom Communications, Inc*. (2003) 109 Cal.App.4th 1551, 1560-1561.)

We also note there is nothing in the record before us showing Investors raised the impeachment issue below and there is some authority suggesting that they forfeited this ground by their failure to bring it to the trial court's attention. (See *Church v. Wade* (1947) 80 Cal.App.2d 412, 420 [proponents of evidence cannot raise new ground for admission for first time on appeal].)

Because the trial court's evidentiary decision was within the bounds of reason under these circumstances, we decline to find the trial court abused its discretion by excluding the compact disc. Further, the compact disc was largely cumulative of another exhibit that was admitted — the letter from First Trust to Small, which referenced the telephone conversation and set forth reasons for First Trust's conclusion that Heath was violating the state's securities laws. Any error in excluding the compact disc therefore was harmless. (See *Guardianship of Levy* (1955) 137 Cal.App.2d 237, 250; see also *Vossler v. Richards Manufacturing Co.* (1983) 143 Cal.App.3d 952, 960.) A more favorable outcome would not have resulted had the cumulative compact disc been admitted.

C. *Exclusion of Heath's Criminal Trial Testimony*

The trial court sustained Small's objection to excerpts of Heath's testimony given at his criminal trial.

Investors bear the burden of showing Heath's criminal trial testimony falls within an exception to the hearsay rule. (*Gatton v. A.P. Green Services, Inc.* (1998) 64 Cal.App.4th 688, 693 (*Gatton*).) Evidence Code section 1292, subdivision (a) addresses the use of former testimony given in another case and provides:

> "Evidence of former testimony is not made inadmissible by the hearsay rule if: [¶] (1) The declarant is unavailable as a witness; [¶] (2) The former testimony is offered in a civil action; and [¶] (3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing."

Relying on *Williams v. Saga Enterprises, Inc.* (1990) 225 Cal.App.3d 142, 148-150 (*Williams*), Investors claim that Small's hearsay objection should have been overruled because in summary judgment proceedings authenticated former testimony is treated the same as a witness's declaration and therefore is admissible. Investors' reliance is misplaced.

In *Williams*, *supra*, 225 Cal.App.3d 142, there was no hearsay objection lodged (*id*. at p. 149, fn. 2); here there was. Furthermore, *Williams* has been criticized as "unpersuasive" in setting forth a "casual view of trial testimony from another trial and declarations on summary judgment as being 'the same . . . .'" (*Gatton*, *supra*, 64 Cal.App.4th at p. 694; accord, *L&B Real Estate v. Superior Court* (1998) 67 Cal.App.4th 1342, 1348.) "Our Legislature has given this careful consideration and decided otherwise, mandating both unavailability, to ensure necessity, and a similar interest and motive in the prior proceeding, to ensure fairness." (*Gatton*, at p. 694.) We agree. Neither the prosecution nor the defense in Heath's criminal trial "would have been motivated to look after" Small's civil liability interests (*ibid*.), and Small was not able to cross-examine Heath.

The trial court properly sustained Small's objection to Heath's criminal trial testimony.

D. *Exclusion of McDonald's Deposition Testimony*

Small objected to the admission of Attorney McDonald's deposition testimony from another action on the same grounds that he objected to Heath's testimony from his

criminal trial. The court sustained the objection. Using the analysis applied to Heath's criminal trial testimony, we find no error.

II

Summary Adjudication of the Legal Malpractice Cause of Action

Estate Investors contend that the trial court erroneously granted summary adjudication in favor of Small on their legal malpractice claim, asserting there is a triable issue of fact as to whether Small breached (1) his duty to inform them of negative information about their Heath & Associates' investments; and (2) his duty to disclose his conflict of interest in the representation of both Heath, Schlarmann and their financial entities, and them.

"A summary adjudication motion is subject to the same rules and procedures as a summary judgment motion. Both are reviewed de novo." (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819.) A defendant is entitled to summary judgment by establishing the action is barred by a "'complete defense.'" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) Summary judgment is proper if there is no triable issue of material fact and the moving party is entitled to summary judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) Concomitantly, "[a] motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (*Id.*, subd. (f)(1).) The purpose of summary judgment "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine

whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar*, *supra*, 25 Cal.4th at p. 844.)

We review de novo the trial court's decision to grant summary judgment, reviewing the ruling, not the rationale. In reviewing the judgment, we apply the same three-step analysis used in the trial court by: (1) identifying the issues framed by the pleadings; (2) determining whether the moving party has negated the opponent's claims; and (3) determining whether the opposition has demonstrated the existence of a triable, material issue of fact. (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.)

When reviewing a grant of summary judgment, we make "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222-223.)

"The elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200.)

In granting summary adjudication on the legal malpractice cause of action, the trial court found "the scope of Small's duty to act as a reasonable trust and estates attorney does not include advising plaintiffs of the alleged harm associated with their

investments with Heath." The trial court also found there was no conflict of interest between Small's representation of Heath, Schlarmann and their business entities and his representation of Estate Investors, because Small's representation of Estate Investors was limited to trusts and estates, and there was no "substantial relationship" between Small's representation of Heath and his representation of Estate Investors. (See fn. 17, *post*.)

The problem with the trial court's approach — as well as that of the parties — is that this is not a garden variety legal malpractice action. Instead, this case involves an attorney's simultaneous dual representation of clients with adverse or potentially adverse interests. That should have been the focus below, rather than the duties of an attorney to his or her client where there is not simultaneous dual representation. There are a number of ethical rules associated with representing clients with adverse or potentially adverse interests, and the principal issue presented here is whether Small's acts or omissions constituted a breach of his professional duty arising from the simultaneous or concurrent representation.

For example, the claim that Small breached his duty to disclose to Estate Investors negative information he had about the Heath entities in which they had invested fails to take into account Small's duty to Heath "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Bus. & Prof. Code, § 6068, subd. (e)(1).) "[T]he attorney's duty of confidentiality . . . fosters full and open communication between client and counsel . . . ." (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846.) "Protecting the confidentiality of communications between attorney and client is fundamental to our

legal system." (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146 (*Speedee Oil Change*).) Therefore, the duty of disclosure Estate Investors sought to impose on Small was superseded by Small's attorney-client relationship with Heath and Schlarmann.

Confidentiality is not the only value at stake when a lawyer concurrently represents clients with adverse interests. "A . . . distinct fundamental value of our legal system is the attorney's obligation of loyalty. Attorneys have a duty to maintain undivided loyalty to their clients . . . ." (*Speedee Oil Change, supra,* 20 Cal.4th at p. 1146.) "The effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel." (*Ibid*.) The issue presented in this case was whether Small's duty of loyalty to Estate Investors was eclipsed by his concurrent representation of Heath, Schlarmann and their business entities, to which he also owed a duty of loyalty.

Attorneys are required to avoid representing clients with conflicting interests. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282 (*Flatt*).) This is an elementary principle of law, "analogous to the biblical injunction against 'serving two masters' (Matthew 6:24)." (*Id*. at p. 286.) It "is such a self-evident [rule] that there are few published appellate decisions elaborating on it." (*Ibid*.)

California State Bar Rules of Professional Conduct, rule 3-310(C) prohibits dual representation of clients whose interests actually or potentially conflict in the absence of

the informed written consent of both clients.[12] The rule prohibits dual representation of such clients without their informed written consent even if the clients' matters are unrelated. (*Flatt, supra,* 9 Cal.4th at p. 284 ["Even though the simultaneous representations may have *nothing* in common, and there is *no* risk that confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be *required*."].) In simultaneous dual representation cases, it is presumed that the duty of loyalty has been breached and counsel is automatically disqualified. (*Id*. at pp. 284-285.) This is so because in simultaneous representation cases — as opposed to cases where there is successive representation of clients with potentially adverse interests — "the attorney's duty — and the client's legitimate expectation — of *loyalty*, rather than confidentiality" is at stake and a more stringent standard is appropriate. (*Id*. at p. 284; *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, 1056 ["'[T]he principle precluding representing an interest adverse to those of a current client is based not on any concern with the

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12 Rule 3-310 of the California Rules of Professional Conduct states in pertinent part:

"(C) A member shall not, without the informed written consent of each client: [¶] (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or [¶] (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or [¶] (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter."

"(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."

confidential relationship between attorney and client but rather on the need to assure the attorney's undivided loyalty and commitment to the client.'"].)[13]

The presumption that the duty of loyalty has been breached in concurrent dual representation cases may be rebutted if the attorney obtains informed written consent from both clients. (*Flatt*, *supra*, 9 Cal.4th at p. 285, fn. 4.)

The Rules of Professional Conduct speak of potential conflict and actual conflict (see Rules of Prof. Conduct, rule 3-310(C); see fn. 12, *ante*); the same concept can be expressed by the phrases "potential adverse interests" and "adverse interests." The *potential* conflict or *potential* adverse interests for Small (who represented Heath, Schlarmann and their business entities) to accept Estate Investors (who had invested or planned to invest in Heath's business entities) as clients is patent. This is so even if Heath and Schlarmann's business entities were legitimate and the securities they sold to Estate Investors were not the money-raising vehicles used in a ponzi scheme. The trial court was mistaken when it ruled as a matter of law that Small had no conflict of interest. At a minimum, there was a *potential* conflict of interest when Small accepted representation

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13 Where the conflict arises from an attorney's former client rather than a current client, and the case involves successive representation of clients with potentially adverse interests, the primary value at issue is the attorney's duty to maintain confidentiality. In successive representation cases, "the governing test requires that the client demonstrate a '*substantial relationship*' between the subjects of the antecedent and current representations." (*Flatt*, *supra*, 9 Cal.4th at p. 283.) If an attorney successively represents clients with adverse interests and the subjects of the two representations are substantially related, the need to protect the first client's confidential information requires that the attorney be disqualified from the second representation. (*Ibid*.)

of Estate Investors, and he was required to obtain the informed written consent of all his clients to the representation.

Estate Investors' malpractice cause of action, however, went further than claiming a potential conflict. The gist of their claim is that Small had an *actual* conflict of interest because Heath's and Schlarmann's business entities were fraudulent and the securities they sold to Estate Investors were worthless, and Small, knowing about the fraud, breached his duty of loyalty to Estate Investors by not informing them. An actual conflict of interest exists "'whenever [a] common lawyer's representation of . . . one [client] is rendered less effective by reason of his [or her] representation of the other.'" (*Vivitar Corp. v. Broidy* (1983) 143 Cal.App.3d 878, 882.) Whether Small's simultaneous dual representation was or became an actual conflict rested on whether he knew that Heath's business entities were selling suspect securities. If Small had such information, his duty of loyalty to his Estate Investor clients would have obligated him to inform them of that fact to protect their estate distribution wishes; however, his representation of Heath, Schlarmann and their business entities — and his duty of loyalty to them — would have precluded the disclosure. Such a scenario would present the classic actual conflict.[14]

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14 An actual conflict could also arise in a simultaneous dual representation if, after accepting representation of the second client, the attorney later learned adverse information about the first client; the attorney's potential conflict would then become an actual conflict. In this second type of scenario, if the original informed written consent did not sufficiently disclose the nature of the subsequent conflict, the attorney would be required to obtain the further informed written consent to the subsequent conflict or withdraw his or her representation. (See *Visa U.S.A., Inc. v. First Data Corp.* (N.D. Cal. 2003) 241 F.Supp.2d 1100, 1106; Rules Prof. Conduct, rule 3-310(C)(2); see also *In re Marriage of Friedman* (2002) 100 Cal.App.4th 65, 70-71.)

Virtually all of the evidence that Estate Investors presented below to show Small knew of the fraudulent securities scheme — or was put on notice that there might be fraud — was not competent evidence or was properly excluded by the trial court. (See fns. 3 & 9, *ante*.) However, that cannot be said about the DOC's desist and refrain orders issued against Heath & Associates in 1998, which Small undisputedly learned about through his representation of Heath. Small claimed he concluded the DOC's orders were meritless, based on his reading of the stipulated settlement and his conversations with Attorney McDonald, who represented Heath in the administrative proceeding. Although Estate Investors did not present competent evidence to raise a triable issue of fact as to Small's conclusion in this regard, the question remains whether, regardless of his conclusion that the DOC orders were meritless, he should have informed Estate Investors of the existence of the orders in keeping with his duty of loyalty to them. With the DOC orders and paragraph 7 of Copeland's declaration, stating Small breached his duty of care to Estate Investors by not doing so,[15] Estate Investors have raised a triable issue of fact as to whether there was an actual conflict of interest in Small's representation of Heath, Schlarmann and their business entities, and Estate Investors.

The summary adjudication motion on the legal malpractice cause of action also must be reversed because the trial court employed the wrong test in determining as a

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15 Copeland's opinion stated in paragraph 7 read in part: "I am of the opinion that Small fell below the standard of care in failing to disclose that on or about March 20, 1998, while Small was performing estate plan services . . . , Small learned that the California Department of Corporations had issued three cease and desist orders against Heath, Schlarmann, and various of their entities in which Plaintiffs were investing."

matter of law there was no conflict of interest. (See fn. 13, *ante*.) The trial court incorrectly used the less stringent substantial relationship test in rejecting Estate Investors' claim that Small breached his duty to disclose a conflict of interest. The court ruled:

> "In this case, Small's representation of Heath was not in conflict or substantially related to Small's representation of [Estate Investors] for trust and estates matters. Small represented Heath in business matters unrelated to the trust and estate matters of plaintiffs. Small's representation of [Estate Investors] was limited to trust and estates. Therefore, there is no conflict of interest."

Because this is a simultaneous — not a successive — representation case, the trial court's finding there was no conflict of interest based on the substantial relationship test cannot stand. Before undertaking the representation of Estate Investors, Small had an ethical duty (1) to disclose to them that he represented Heath, Schlarmann and their business entities; and (2) obtain written consent to the dual representation. (Cal. Rules Prof. Conduct, rule 3-310(E).) The evidence presented shows Small failed to do so, and, therefore, Estate Investors have raised a triable issue as to whether Small's representation of Estate Investors was prohibited under the Rules of Professional Conduct. (See fn. 12, *ante*.) Legal malpractice can be predicated upon representation of conflicting interests. (See 2 Mallen & Smith, Legal Malpractice (2009) § 17:18, pp. 1021-1034.)

We conclude the trial court erred in granting summary adjudication on the legal malpractice cause of action on the basis that there was no breach of duty to disclose a conflict of interest. The elements of causation and damages are factual issues that were not suited for summary adjudication in this case. Estate Investors may proceed with their

malpractice cause of action based on Small's breach of his duty to disclose the conflict of interest.[16]

III

Summary Adjudication of Other Causes of Action

A. *Fraud Based on Concealment Cause of Action*

Civil Code section 1710, subdivision (3) provides that deceit includes "[t]he suppression of a fact, by one who is bound to disclose it . . . ." In general, to prove a fraud based on concealment, a plaintiff must demonstrate: (1) the defendant concealed or suppressed a material fact, (2) the defendant had a duty to disclose the fact to the plaintiff, (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff was unaware of the fact and would not have acted as he or she did if he or she had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff sustained damage. (*Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 131.)

1. *Estate Investors' Cause of Action for Fraud Based on Concealment*

Estate Investors contend Small concealed material facts from them, such as the DOC's desist and refrain orders and the poor financial condition of the Heath business entities. Further, Estate Investors claim by virtue of the attorney-client relationship and agency principles, Small had the duty to disclose to them this information. This liability

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16 It thus is unnecessary for us to address Estate Investors' assertion that Small's failure to present expert evidence regarding the duty issue was fatal to his motion for summary adjudication of the legal malpractice cause of action.

theory is a variation of the main premise behind Estate Investors' legal malpractice cause of action, which, as we explained above, is complicated because Small, as attorney for Heath and Schlarmann, was ethically precluded from revealing any confidences of that attorney-client relationship. (See, e.g., Bus. & Prof. Code, § 6068, subd. (e).) Because of the fiduciary and contractual relationship Small had with the Estate Investors, we agree he had a duty to disclose material information to them; however, his conflict of interest precluded him from doing so.

Estate Investors further contend that Small obligated himself to disclose material facts because he volunteered some favorable statements about Heath and his business entities. (*Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 201 (*Cicone*) ["where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated"]; *Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 398 (*Pavicich*).) However, this contention applies only to the Pattersons; it was only to the Pattersons that Small said (1) his other clients were happy with their investments in Heath's business entities, (2) he did not know of any complaints about the entities, and (3) Heath would take care of them. Small argues that what he volunteered to the Pattersons was more akin to puffery or a "'casual expression of belief'" (*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 291) than a representation of fact. Whether these volunteered statements were mere puffery or representations of fact is not determinative.

The Estate Investors' cause of action for fraud by active concealment fails because Estate Investors did not produce admissible evidence to create a triable issue of material

fact regarding the requisite intent to defraud element of the tort. For example, with respect to Small's failure to disclose the DOC desist and refrain orders, Estate Investors did not produce competent evidence to discredit Small's evidence that he believed the orders were meritless after discussing them with Attorney McDonald, who represented Heath in conjunction with the DOC orders, and reading the stipulated settlement. In their appellate briefing and at oral argument, Estate Investors have continued to rely on evidence that the trial court excluded. We have found some of this evidence, such as Heath's trial testimony and McDonald's deposition testimony in another proceeding, was correctly excluded. As to the rest of the excluded evidence, Estate Investors have not challenged the trial court's exclusionary rulings on appeal and therefore have forfeited any assignment of error. (See fn. 9, *ante*.)

In their appellate brief, Estate Investors state: "Small had a lot at stake in taking actions to protect Heath and Schlarmann to the detriment of the limited partners. . . . Had Small disclosed the material information . . . , he would have substantially hurt his ability to garner new clients from Heath & Associates and he would have lost both Heath and Schlarmann (and their multitude of entities) as a constant source of income." Although fraudulent intent is often shown by circumstantial evidence (*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30), Estate Investors' argument — which points to only a potential motive for Small not to make disclosures damaging to Heath's business entities — falls far short of establishing he had the requisite intent to defraud. While circumstantial evidence can defeat a summary judgment motion, the inferences drawn from that evidence must be reasonable. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th

472, 483.) Such inferences "'must be reasonably deducible from the evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork.'" (*Waschek v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 647.) "[R]esponsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.)

The trial court properly granted Small summary adjudication on Estate Investors' cause of action for fraud by active concealment.

2. *Other Investors' Cause of Action for Fraud by Active Concealment*

The Investors who were not Small's clients contend Small had a duty to disclose material facts because he spoke to them about Heath and/or the investments at the seminars. (See *Cicone, supra,* 183 Cal.App.3d at p. 201; *Pavicich, supra,* 85 Cal.App.4th at p. 398.) However, the evidence is undisputed that Small did not talk about Heath or investments at the seminars he attended. Small discussed only estate planning issues. Further, it is undisputed that Small never met any of these Investors. At oral argument, Investors' counsel acknowledged there was no evidence that Small talked about Heath's investment opportunities with any Investors at the seminar at any point — before, during or after his presentation.[17]

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17 That is not to say that we are comfortable with Small's participation at the seminars. Indeed, we find Small's appearance at the joint seminar somewhat troublesome in that it is conceivable that some attendees would consider it as an endorsement of Heath's business entities by an attorney. Nonetheless, on this record, we cannot say that

Furthermore, in the absence of any fiduciary, contractual or other relationship with the other Investors, Small did not owe them a duty to disclose material information. (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 337; see also *Heliotis v. Schuman* (1986) 181 Cal.App.3d 646, 650-651.) Rather, Small's duty of loyalty to Heath, his client, precluded disclosure to the other Investors. (*LiMandri*, at p. 338.)[18]

The trial court properly granted Small summary adjudication on the other Investors' cause of action for fraud by active concealment.

B. *Aiding and Abetting Fraud Cause of Action*

"Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person . . . knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act . . . ." (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846.) "California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted." (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145.) "Knowledge is the crucial element." (*Ibid*.) Moreover, "while aiding and abetting may not require a defendant to

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Small's participation in the seminars created a duty for him to make disclosures regarding the investment opportunities offered by Heath to members of the audience.

18 Investors claimed below that Small should have disclosed material facts to them because they were limited partners and he was the attorney for the partnerships. (See *Wortham & Van Liew v. Superior Court* (1987) 188 Cal.App.3d 927.) The trial court rejected this claim, finding there was no evidence that they were limited partners of any partnership that Small represented. Investors have not pursued this argument on appeal.

agree to join the wrongful conduct, it necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act." (*Howard v. Superior Court* (1992) 2 Cal.App.4th 745, 749 (*Howard*).)

Investors contend they provided sufficient evidence of Small's knowledge of Heath's and Schlarmann's fraudulent scheme and Small's work to assist, perpetrate and hide the fraud to defeat summary adjudication of the aiding and abetting fraud cause of action. The knowledge evidence, according to Investors, consisted of Small's awareness of the DOC's desist and refrain orders and of the dire financial condition of Heath's and Schlarmann's projects. The Investors also claim that Small's continued attendance at the seminars showed that he knew potential investors were not informed of the pitfalls of the investments. The DOC's desist and refrain orders do not establish the requisite knowledge because the undisputed admissible evidence was that Small, after discussing the orders with Attorney McDonald and reading the stipulated settlement, came to the conclusion that Heath's business entities "could remain in business, . . . could have investors . . . and . . . could tell people there's nothing in that settlement that was intended to impugn their name or integrity."[19] Further, it was undisputed that Small did not sell

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19 Our determination here is not inconsistent with our finding that there was a triable issue of fact on whether Small had a duty to disclose the *existence* of the DOC desist and refrain orders to Estate Investors with respect to their legal malpractice cause of action. In contrast to that cause of action, the aiding and abetting cause of action would have required evidence that Small knew the DOC orders showed Heath's business entities and investments were fraudulent. Investors did not produce competent evidence to raise a triable issue of fact regarding Small's knowledge of the significance of the orders.

securities to the Investors, did not pick or choose investor funds, did not know how the investor accounts were set up, and did not assist Heath and Schlarmann with funding their business entities. Evidence that Small knew that Heath's and Schlarmann's business entities were in dire financial straits does not support a reasonable inference of Small's knowledge or complicity in fraud. Nor does Small's attendance at the seminars, where he discussed only estate planning issues. The letter to the construction loan lender does not show that Small consciously decided to help Heath and Schlarmann perpetrate a fraudulent scheme. The letter was addressed only to the lender and specifically stated that the letter was not to be relied on for any other purpose than procuring the loan from the lender. Small's investment with Heath in Newport Mortgage Fund had nothing to do with Investors and their investments.[20] [21]

The trial court properly granted Small summary adjudication on all Investors' cause of action for aiding and abetting fraud because they failed to present any competent evidence that Small had actual knowledge of the specific fraud perpetrated on them and made a conscious decision to participate in the fraudulent scheme.

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[20] Small was a 50 percent shareholder of Newport Mortgage Fund, a real estate investment trust that purchased a four-unit apartment building, and Heath and Heath's wife owned the other 50 percent of the shares in the corporation. The apartment building was sold in 2003. None of the Investors invested in Newport Mortgage Fund.

[21] Under the Rules of Professional Conduct, Small should have disclosed his business relationship with Heath in Newport Mortgage Fund to Estate Investors. (Rules Prof. Conduct, rule 3-310(B)(1).)

C. *Conspiracy Cause of Action*

"In order to maintain an action for conspiracy, a plaintiff must allege that the defendant had knowledge of and agreed to both the objective and the course of action that resulted in the injury, that there was a wrongful act committed pursuant to that agreement, and that there was resulting damage." (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 823.)

Just as Investors failed to present competent evidence that Small had actual knowledge of the fraud as discussed with the aiding and abetting cause of action, they did not present admissible evidence from which the trier of fact could draw an inference that Small knew that Heath and Schlarmann were operating a ponzi scheme. Nor did Investors present any evidence from which an inference could be drawn that Small agreed both to the objective and to the course of action that resulted in Investors' injury. The claim therefore fails.

D. *Unfair Business Practices Cause of Action*

Business and Professions Code section 17200 prohibits unlawful competition, including an "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." (*Ibid.*)

The trial court granted summary adjudication on Investors' cause of action for unfair business practices against Small and others based on *Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777 (*Bowen*), which held that Business and Professions Code section 17200 does not apply to securities transactions. (*Bowen*, at p. 788.) In *Bowen*, this court concluded that Business and Professions Code section

17200 does not pertain to securities transactions because of the comprehensive regulatory umbrella of the Securities and Exchange Commission over such transactions. (*Bowen*, at pp. 786-789 & fn. 9.)

Investors contend the trial court's reliance on *Bowen, supra,* 116 Cal.App.4th 777, was error because their pleading specifically alleged their claim was for acts outside the defendants' securities transactions. In their cause of action for Violations of Business and Professions Code sections 17200 and 17500,[22] Investors alleged: "This cause of action is not preempted by the California Securities Laws because this cause of action does not seek redress of Defendants' conduct in violation of the California Securities Laws but is brought to redress Defendants' unlawful and fraudulent mismanagement of Plaintiffs' investment accounts."

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22 Business and Professions Code section 17500 reads in part: "It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised."

Assuming arguendo that fraudulent mismanagement of investment accounts containing fraudulent securities does not bring the cause of action within *Bowen*, *supra*, 116 Cal.App.4th 777, as the trial court noted, Investors failed to present evidence that Small "*managed*" Investors' investment accounts. It was undisputed that Small did not know how the investor accounts were set up and did not choose the funds or select where Investors' monies would be placed. Schlarmann confirmed that he and Heath did not consult Small to break up and assign portions of promissory notes to investments.

Investors failed to raise a triable issue of fact as to whether Small should be held liable to them for unfair business practices.

DISPOSITION

The summary adjudication granted against Estate Investors on their cause of action for legal malpractice is reversed. In all other respects, the judgment against Investors is affirmed. Each party shall bear its own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (5).)

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.